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October 21, 2004

Senator Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20530

Dear Senator Hatch:

I understand that there have been proposals to devise a process for approving generic versions of drugs derived from living organisms (known as "biologics") and that you have invited interested parties to comment on the legal issues that such proposals present. I have been asked by the Generic Pharmaceutical Association to provide my views on whether the Food & Drug Administration's reliance on proprietary data supplied by the branded companies for the original versions of approved biologics (or on the conclusions previously drawn from that data by the FDA) in connection with its consideration of subsequent applications violates the Fifth Amendment's Takings Clause. For the reasons that follow, it is my view that, with proper safeguards, such reliance would not constitute an unconstitutional taking. The contrary view would call into question the constitutionality of a number of well-established federal regulatory schemes, including the process for approving generic pharmaceuticals under the Hatch-Waxman Act.

It was my great honor to have served as the General Counsel to this Committee under your Chairmanship from 1995-96. I also recently served as Deputy Assistant Attorney General in the Office of Legal Counsel of the Department of Justice, which is charged in part with advising the executive branch on the constitutionality of proposed legislation. I have clerked for Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit and for Justice Clarence Thomas of the U.S. Supreme Court. I am currently a visiting fellow at the American Enterprise Institute and a professor of law at the Boalt Hall School of Law, University of California at Berkeley, where I have taught and written in the fields of constitutional law, the separation of powers, and civil procedure since 1993. The conclusions expressed here are my own, and do not represent the views of the American Enterprise Institute or the University of California.

Please let me know if I can provide any additional information.

With warmest regards,

John C. Yoo
Professor of Law

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October 21, 2004

VIA E-MAIL & OVERNIGHT MAIL

Division of Dockets Management (HFA-305)
Food and Drug Administration
5630 Fishers Lane, Room 1061
Rockville, MD 20852

Re: Docket No. 2004P-0171/CP & 2003P-0176/CP

I understand that there have been proposals to devise a process for approving "generic" versions of drugs derived from living organisms ("biologics"). I have been asked by the Generic Pharmaceutical Association (GPhA) to provide my views on a question that has arisen in connection with these proposals, i.e. whether authorizing the Food & Drug Administration to rely on proprietary data supplied by the branded companies for the original versions of approved biologics (or on the conclusions previously drawn from that data by the FDA) in connection with its consideration of subsequent applications would violate the Fifth Amendment's Takings Clause. Assuming that the FDA's use and treatment of such data is comparable to the agency's use of proprietary data under the Hatch-Waxman Act, in my opinion there would be no violation of the Takings Clause. Any other conclusion would lead one to conclude that the Hatch-Waxman Act itself and the FDA's application of that Act would violate the Constitution as well. These conclusions are my own and do not represent the views of the University of California.

I. INTRODUCTION

Since I assume that a proposal for approving generic biologics would be modeled to some degree on the approval of generic pharmaceutical products under the Hatch-Waxman Act, it is worth reviewing that regulatory scheme at the outset.

Under section 505(b)(1) the Federal Food, Drug, and Cosmetic Act (FFDCA), a pharmaceutical company that seeks to manufacture a new drug must file a new drug application (NDA) with the FDA that includes information about the drug's safety and effectiveness. 21 U.S.C. §355(a). The NDA must also include the number of any patent claiming the drug or a method of using the drug. If the FDA approves the NDA, it

publishes the drug and the patent information in the *Approved Drug Products with Therapeutic Equivalence Evaluations* ("the Orange Book").

The Hatch-Waxman Amendments to the FFDCA created a streamlined process for the FDA to review applications by drug manufacturers to produce generic versions of drugs previously approved by the NDA process. Under section 505(j) of the FFDCA, a generic producer may rely in part on the FDA's conclusion that the brand-name drug is safe and effective by showing bioequivalence with the NDA-approved drug. 21 U.S.C. §355(j)(2)(A). The Hatch-Waxman Amendments were enacted in 1984 and I am aware of no case in which any party has challenged the FDA's reliance on its prior conclusions of safety and efficacy in connection with the abbreviated new drug applications (ANDAs) of generic companies. Moreover, in October 2003, the FDA itself concluded that its practice of relying on the conclusions reached in reliance on proprietary data in connection with subsequent NDAs under 21 U.S.C. §355(b)(2). Letter of Janet Woodcock, M.D. to Katherine M. Sanzo, Esq., et al., October 14 , 2003.

"Biologics" refers to drugs that are produced by biological systems and organisms. Historically, as I understand it, many biologics are approved under § 351 of the Public Health Services Act (PHSA), 42 U.S.C § 262. As part of the PHSA process, a brand name drug producer files safety and effectiveness data to support its application for a license to market a biologic drug. FDA regulations specify the nature of the data required. 21 CFR 601.2. The PHSA also contains a provision that makes clear that it does not affect the FDA's jurisdiction under the FFDCA. 42 U.S.C § 262(j). Thus, the FDA also may approve biologic products under the FFDCA, as it has done with insulin and human growth hormone.

The PHSA does not make express provision for approving generic biologics similar to the ANDA approval process under the Hatch-Waxman Amendments to the FFDCA. I understand that the FDA has expressed doubts concerning its authority to devise a generic approval process by regulation.[1] As a result, Congress is considering enacting legislation to provide a pathway for the approval of generic biologics.

Opponents of generic biologics argue that some pathways would take private property without just compensation, as prohibited by the Takings Clause of the Fifth Amendment. Specifically, they argue that proposals that would allow the generic applicant to draw upon data submitted by previous applicants, or to rely upon information within the knowledge and experience of the Agency that had been generated

[1] I think the FDA's reservations in this regard are unwarranted. The PHSA grants to the Secretary of Health and Human Services the authority to approve licenses for the production of biologics if the product is "safe, pure, and potent" and is manufactured in a facility with processes by which the product continues to be safe, pure, and potent. 42 U.S.C. § 262(a)(2)(C). It gives the Secretary of Health and Human Services the power to "establish, by regulation, requirements for the approval, suspension, and revocation of biologics licenses." *Id*. at § 262(a)(2)(A). The Secretary has already used this rulemaking authority to establish procedures for the approval of biologics. *See* 21 C.F.R. § 601.2. Under this authority, I see no statutory obstacle to the Secretary's deciding to allow the agency to rely on previously submitted safety and effectiveness studies in considering later generic applications or on information already within the agency's knowledge and experience.

by previous applicants. Because this information might constitute trade secrets, a form of intellectual property, opponents contend that any disclosure or use of the information by the Agency would constitute a taking for which "just compensation" is required by the Constitution. These comments address this argument, and concludes that no taking would occur as a result of the proposals to allow approval of generic biologics.

II. The Law Of Takings

Brand companies suggest that a process for approving generic biologics that permitted reliance on proprietary data in approving subsequent applications could constitute an unconstitutional taking of private property under the Fifth Amendment. They assert that proprietary data and other information submitted in support of any application for agency approval constitutes a trade secret, which, coupled with FDA's long-standing practice of non-disclosure, creates a reasonable investment-backed expectation that Agency use of the data in approving a generic version would constitute a taking. A review of Takings Clause case law, with particular attention to its application to regulated industries, demonstrates that the FDA's proposed change in approving biologics will not constitute a taking.

The Takings Clause applies to governmental seizure of property, such as the exercise of the power of eminent domain. Physical occupation or seizure of land by the government, for example, triggers the obligation that the government pay just compensation. *See*, *e.g.*, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 231-32 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). The Takings Clause also applies to diminution in the value of property caused by government regulation, even when that regulation does not result in actual physical occupation of the property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The law of takings as applied to dimunition of value in property caused by governmental regulations is significantly different than the law relating to physical property:

> Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.

Mahon, 260 U.S. at 413.

In *Mahon*, the Court observed that when regulations imposed by the state eliminated the value of the property at hand, a taking could occur. As Justice Holmes explained, "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415. Since this decision, the Court has established guidelines for determining when governmental regulation of property has gone "too far" and amounts to a taking.

Government regulations typically do not implicate the same Fifth Amendment jurisprudence as occupations or appropriations of private property. Courts evaluate cases involving the outright occupation or appropriation of tangible property for public

use under a *per se* rule. Such regulations deprive the owner of the property of the fundamental right to "exclude others." *See Kaiser Aetna v. United States,* 444 U.S. 164, 179 180 (1979); *Loretto,* 458 U.S. at 434-35; *Nollan v. California Coastal Comm.,* 483 U.S. 825 (1987). On the other hand, courts evaluate regulations which merely place burdens on an owner's exercise of property rights with significantly less scrutiny. As the Supreme Court observed last year, "[o]ur regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (internal quotations and citations omitted).

Even if a regulation of property leaves the owner with its "right to exclude," courts will still characterize the regulation as a *per se* takings if the regulation effectively destroys "*all* economically beneficial uses" of the property, so long as the regulated activity is not a nuisance-like activity prohibited or constrained at common law. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019 (1992). The courts have recognized that such regulation is a very rare occurrence. Indeed, even where government regulation of property results in a high (but not complete) diminution of value, the courts will not hold a *per se* rule that a taking has occurred. As the Court stated just two years ago:

> The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of *all* economically beneficial uses of his land. Under that rule, a statute that wholly eliminated the value of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted. The emphasis on the word 'no' in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. Anything less than a complete elimination of value, or a total loss, the Court acknowledged, would require the kind of analysis applied in *Penn Central* [*Transp. Co. v. City of New York,* 438 U.S. 104 (1978)] .

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002) (internal quotations and citations omitted). Accordingly, unless government regulation completely deprives property of its entire value, the federal courts will not find a *per se* taking to have occurred.

In the vast majority of cases, where no *per se* taking has occurred, the courts balance the competing public and private interests at issue in evaluating governmental confiscations of property. Takings analysis in this context becomes a function of (a) the character of the governmental action; (b) its economic impact; and (c) its interference with reasonable, investment-backed expectations. *Penn Central,* 438 U.S. at 124; *Pruneyard Shopping Ctr. v. Robino*, 447 U.S. 74, 83 (1980). The Supreme Court has, in fact, applied this analysis to the context of regulatory decisions approving products and

the value of information provided to an agency by a private party. The foundational case is *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

In *Monsanto*, the Court addressed a takings claim against the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), under which the Environmental Protection Agency approves pesticides. As first enacted, FIFRA required an applicant to submit test data supporting the claims on the label of a pesticide, and prohibited disclosure of "any information relative to formulas of products," but did not address the disclosure of health and safety data. *Id.* at 991. In 1972, Congress amended FIFRA to create a comprehensive regulatory scheme for pesticides that governed their use as well as sale and labeling, and required the FDA to find that a pesticide would not cause "unreasonable adverse effects on the environment" before approving it for sale. *Id.* at 992 (citing 86 Stat. 980-81).

The 1972 amendments contained several changes regarding the use and disclosure of application data. First, Congress allowed the applicant to designate portions of the data as "trade secrets or commercial or financial information," and prohibited EPA from publicly disclosing information containing such information. *Monsanto*, 467 U.S. at 992 (citing 86 Stat. 989). Second, Congress permitted the EPA to consider data submitted by one applicant to support a different application for a similar chemical. Significantly, in order to take advantage of this provision, the second applicant had to offer to compensate the first applicant who had submitted the original data.[2] *Id.* Despite this "mandatory data-licensing scheme," Congress prohibited the EPA from considering any trade secret, commercial, or financial information to support a second application without the consent of the original applicant. *Id.* at 992-93. Courts interpreted this information to include health, safety and environmental data consistent with the definition of trade secrets in the Restatement of Torts. *Id.* at 993.

Congress again amended FIFRA in 1978. Under the 1978 amendments, applicants received a 10-year period of exclusive use for data on new active ingredients in pesticides filed after September 1978. *Monsanto*, 467 U.S. at 994. For applications submitted before September 1978 but after December 1969, the EPA could consider data in support of a second application at least 15 years after the original submission. Like the 1972 scheme, the second applicant was required to offer compensation to the first applicant.[3] *Id.* The 1978 amendments also permitted qualified persons to request disclosure of all health, safety, and environmental information, except for "manufacturing or quality control processes" and other details unless the EPA administrator decided that disclosure was necessary to protect against unreasonable risk of injury to health or the environment. *Id.* at 996. Criminal penalties were provided for wrongful disclosure by the government of confidential or trade secret data.

[2] If negotiations between the first and second applicant failed to reach an agreement on compensation, the EPA was directed to determine an amount, subject to judicial review. *Monsanto*, 467 U.S. at 992.

[3] If the parties could not agree on an amount, they could seek binding arbitration. If the first applicant refused to negotiate or participate in arbitration, it lost its right to compensation. *Id.*

In response to a takings challenge by a company that had submitted proprietary data, the Court considered the various amendments and their effective dates, finding that whether compensation for takings might be required depended on the nature of the disclosure regime established by Congress. First, the Court agreed that the health, safety, and environmental data could be considered a trade secret under state law. Because trade secrets shared many of the characteristics of other intangible forms of property (e.g., they could be assigned or be the res of a trust, and that state law had found trade secrets to be property), the Court found that trade secrets were protected by the Takings Clause. *Id.* at 1002-04. The Court further found that, with respect to trade secrets, (a) the property right is defined by an owner's ability to protect the information against disclosure by third parties, and (b) information generally known in an industry or public knowledge could not constitute a trade secret. *Id.* at 1002. Significantly, the Court also found that any property right could be extinguished if an owner discloses the trade secret to another who has no obligation to maintain its confidentiality. *Id.*

Second, the Court applied the *Penn Central* three-prong test to claims of unauthorized disclosure of trade secret data. In applying this test to FIFRA, the Court found that an applicant could not have any reasonable investment-backed expectation with regard to data submitted after the 1978 amendments came into effect. *Monsanto*, 467 U.S. at 1006. Congress's change in the rules to allow the EPA to consider the data after a 10 year period, its requirement of an offer of compensation from subsequent applicants, and the provision permitting the disclosure of health, safety, and environmental information to public requesters, all put the applicant on notice that it could not expect its data to remain confidential. *Id.* In other words, the statute, after the 1978 amendments, could not give rise to any investment-backed expectations cognizable under the Takings Clause. As the Court observed: "If, despite the data-consideration and data-disclosure provisions in the statute, [the applicant] chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission." *Id.* at 1006-07. The result of this holding on data submitted for government approval is clear: "[A]s long as [the applicant] is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." *Id.* at 1007.[4]

Third, the Court examined whether the pre-1972 FIFRA regime created sufficient conditions to give rise to investment-backed expectations concerning the confidentiality of submitted data. Prior to the 1972 amendments, the Court observed, the statute made no promises concerning the confidentiality of data. Although the Trade Secrets Act, 18 U.S.C. § 1905, creates criminal penalties for government employees who engage in unauthorized disclosure of trade secrets, the Court found that these provisions

[4] It should also be noted that the post-1978 regulatory scheme did not destroy the value of the trade secret to the original submitter. The EPA could itself consider the confidential data in evaluating a subsequent application, but only if the subsequent applicant paid compensation and then only after a ten-year period of exclusivity.

did not guarantee that the government would refrain from using an applicant's data itself when approving successive applications. *Id.* at 1008-09. In the absence of any explicit and specific guarantee of confidentiality, the Court found that an applicant has "no reasonable investment-backed expectation that its information would remain inviolate in the hands of the EPA." *Monsanto.* at 1008. In fact, in regulated industries, the Court observed that applicants could expect that such information might be disclosed:

> In an industry that has long been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure of health, safety, and environmental data concerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest.

Id. at 1008-09. Significantly, the Court reached this conclusion over the dissent of Justice O'Connor, who had argued that statutory silence and no customary agency practice militated in favor of finding a taking. Statutory silence in a heavily regulated industry, the Court found, has the opposite effect – it places applicants on notice that they cannot form reasonable investment-backed expectations that submitted data will not be used by the agency in the future.

Fourth, the Court found that the FIFRA regime in existence from 1972-78 may have provided the guarantees necessary to prohibit the government from using an applicant's data when approving a successive application. Thus, any data submitted during that timeframe could not be used by EPA without just compensation. In deciding that the 1972-78 statutory scheme created a reasonable investment-backed expectation, the Court relied upon the fact that the statutory text during that period: (a) permitted the applicant to protect data by designating it a trade secret; (b) barred EPA from using trade secret data submitted during this period in considering another application; and (c) allowed non-trade secret data to be considered in connection with another application if it required reasonable compensation to the first applicant. *Monsanto,* 467 U.S. at 1010-11. With these express statutory provisions, the Court concluded that "the Federal Government had explicitly guaranteed to [applicants] an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." *Id.* at 1011. Disclosure of trade secret data "to others" destroys the property interest of the owner, even if the data continues to be useful to the applicant. *Id.*

III. The Agency Can Approve Generic Biologics Without Effecting An Unconstitutional Taking

A proposal to permit the approval of generic biologics similar to the FFDCA would not raise the takings issue in my opinion.

Initially, it is worth considering in greater detail just what property interest would be threatened by a scheme similar to FFDCA. The companies that submit confidential information in support of their applications would argue that the regulatory scheme threatens their trade secret property interest in the information. However, in the FFDCA context, what the FDA relies on in considering an ANDA is not the proprietary

data itself, but the FDA's own prior determination that the data established that the Orange Book listed drug was safe and effective. So long as the ANDA applicant's drug is bioequivalent — something the ANDA applicant itself must establish — the statute permits the FDA to conclude, in effect, that it does not need to reconsider the safety and efficacy question *de novo*. The agency used the proprietary data itself only in considering the original NDA. With respect to ANDA's, it merely uses the public, non-trade secret *fact* that it concluded that the innovator drug was safe and effective. It is very difficult to view this as a use of the innovator's trade secrets, much less a use that gives rise to a takings issue.[5]

Moreover, even if the agency's reliance on its prior conclusions for subsequent applications is, in some pertinent sense, a use of the innovator's trade secrets, no reasonable investment-backed expectations for brand-name companies could exist under the current FFDCA statutory regime, or, in my opinion, any comparable regime for approving generic biologics. In *Monsanto*, as the Supreme Court observed, in the 1972-78 statutory scheme, Congress specifically amended the relevant statute to (a) allow an applicant to designate information as a trade secret, (b) prohibit the agency from using that information, and (c) require compensation for the use of non-trade secret information. The FFDCA does not contain any such provisions. While Congress could certainly provide comparable guarantees to the proprietors of trade secret information submitted to the agency, as Congress did for a brief period under FIFRA, there is no constitutional obligation to do so if the trade secrets are not destroyed by the agency's disclosing them publicly.

The current FFDCA scheme is analogous to the pre-1972 FIFRA examined in *Monsanto*, where the Court found that an applicant has "no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA." *Id.* at 1008. Here, as there, the relevant statutes are silent with regard to the use of

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[5] In addition, some companies have argued that in the course of approving a company's application, the agency will acquire knowledge of proprietary technology that the agency will inevitably "use" in considering subsequent applications for similar products, that such "use" constitutes a misappropriation of trade secrets, and that generic applicants should be required to make a showing identical to innovators to avoid giving the generic applicants the unfair "benefit" of the tutorial that the innovator gave to the agency.

This argument is incorrect, in my view, for several reasons. It is very doubtful that the general knowledge acquired in connection with its consideration of innovator applications constitutes a trade secret or that the use of it constitutes the misappropriation of trade secrets. The common law of trade secrets recognizes that employees may use the general "know-how" they acquire in their jobs when they switch employers, even if the employee had been exposed to proprietary information. The employee may not use or disclose specific trade secrets, but the fact that the exposure to proprietary data may have made the employee a better engineer or chemist does not give the former employer the right to prevent the employee from working in his chosen field. I would think that similar principles would apply to a regulatory agency. Moreover, even if there were a risk of misappropriation, a specific act of misappropriation does not necessarily amount to a taking. So long as the agency does not destroy the trade secrets, or (what amounts to the same thing in this context) dedicate them to the public by public disclosure, the brand company's property interest remains intact and there is no *per se* taking.

application data for the approval of subsequent applications. And where Congress has established a discretionary system which temporarily benefits a class of manufacturers, and permits the FDA to interpret it within its discretion to disadvantage the same class, no investment-backed expectation is *reasonable*.

Opponents of generic biologics might argue that one provision of the FFDCA does provide a guarantee sufficiently reliable to give rise to a reasonable investment-backed expectation, as defined by *Monsanto*. Section 331(j) of Title 21 prohibits:

> [t]he using by any person to his own advantage, or revealing, other than to the Secretary or official or employees of the Department, or to the courts when relevant in any judicial proceeding under this Act, any information acquired under authority of sections 404, 409, 412, 505, 510, 512, 513, 514, 515, 516, 518, 519, 520, 704, 708 or 721 concerning any method or process which is a trade secret is entitled to protection.

This provision appears on its face to prohibit an individual from "using" information submitted to the Agency, if it qualifies as a trade secret, to his or her "advantage." It also prohibits the revelation of this information except to other members of the Department of Health and Human Services or the courts. There are several reasons, however, why 21 U.S.C. § 331(j) does not amount to a guarantee of confidentiality as described in *Monsanto*.

First, this provision is not a clear prohibition against the use of submitted data to approve subsequent applications. In *Monsanto*, for example, the FIFRA explicitly prohibited the use of submitted data for such purposes. Here, by contrast, there is only a general prohibition on the use or revelation of trade secrets that expressly excludes intra-agency disclosures. Section 331(j) is, therefore, akin to the Trade Secrets Act, which generally bars the unauthorized disclosure of trade secrets, but which the *Monsanto* Court found did *not* serve as a guarantee against future intra-agency use of submitted data.

Second, on its face, Section 331(j) does not prohibit the use of submitted data for official purposes, such as approving subsequent applications for the same biologic. Section 331(j) prohibits two types of conduct: (i) use of a trade secret by a government employee "to his own advantage"; and (ii) revelation of a trade secret outside the Department. Use of the information to approve a biologic does not amount to the type of private gain that concerned Congress in the first part of the statute.

Similarly, Section 331(j) permits the disclosure of the information within the Department. Thus, if, in approving a generic drug company's application for a biologic, FDA publicly stated that it had relied on earlier submitted data, but did not disclose the trade secret data, it would not be in violation of the second part of the statute. The second part of the statute only prohibits public disclosure, but not use by the Department of the information. In fact, in order to give every word of the statute meaning, Section 331(j) should be read to permit the Department's official use of trade secret data. Because the statute specifically prohibits only use of the information by a government employee "to his own advantage," it necessarily permits use of trade secret

information by the Department in its official functions so long as it does not publicly reveal that information.[6]

Third, Section 331(j) stands alone. It is not accompanied by other statutory provisions that, together, indicate that Congress intended to provide guarantees to applicants that their data would remain confidential. Unlike the statutory scheme in *Monsanto*, nothing in the FFDCA indicates that Congress has drawn a careful line between the trade secret data that the FDA may not rely on in evaluating subsequent applications and the non-trade secret data that it may rely on. In fact, the statute does not address the issue at all. Unlike the statute in *Monsanto*, here Congress has not created any compensation scheme by which the subsequent applicant is required to compensate the first applicant; has not included a mandatory procedure for negotiation or arbitration of the amount of compensation; nor has it guaranteed applicants that their data would not be used or disclosed for any other purpose.[7]

Fourth, reading Section 331(j) to bar official use by the FDA of previously submitted data would be absurd. Suppose that a pharmaceutical company submitted a seriously flawed application to produce a biologic. Suppose FDA knew that the application was flawed based upon data submitted by an earlier application for the same biologic. Under a broad reading of Section 331(j), it would be illegal for the FDA to take this earlier information into account. Nothing in the text of Section 331(j) supports this result. If Section 331(j) permits the FDA to consider information, already in its possession, to reject a flawed application, it should also allow the FDA to consider that same type of information to approve an application that meets the Agency's safety and effectiveness standards.

All of this leads but to one conclusion: that a process for the approval of generic biologics under a process similar to that employed under the Hatch-Waxman Act — i.e. one that permits the agency to rely upon data previously submitted by an earlier applicant or upon the conclusions the agency previously reached with regard to that data —would not constitute a taking under the principles set forth in *Monsanto*. At least in the absence of express guarantees that such proprietary information will not be used — guarantees that Congress need not give and should not give if the goal is to encourage the development of generic biologics — an earlier applicant could not have the reasonable

[6] Some have suggested that the FDA's internal documents interpret "to his own advantage" as including a benefit to either the FDA employee or others. *See* Genentech Apr. 8, 2004 Citizen Petition at 12-13, Docket No. 2004P-0171/CP. Even under this line of reasoning, FDA's use of submitted data to approve a subsequent application is not such a benefit. The obvious sense of barring use to the "advantage" of others is that of barring private enrichment *at the expense of the public interest.* Plainly, use in furtherance of the approval of generic drugs or biologics serves the public interest in reducing health care expenditures. Further, these internal Agency documents are not formal statutory interpretations, and can be altered at any time.

[7] In its ANDA regulations, the FDA has provided that an NDA applicant can include a "right of reference or use" for data owned by another. 21 C.F.R. §314.50(g)(3). However, this is not a requirement that the FDA itself must have the permission of the original applicant to consider submitted data, if it is already in the possession of the agency.

investment-backed expectations needed to give rise to a property interest cognizable under the Takings Clause.[8]

Opponents of generic biologics have argued that the FDA, through its regulatory guidance, has created such expectations. While I do not believe that sufficient evidence exists to support such an argument, I will assume such evidence exists for purposes of this discussion only.

Even if FDA had issued a guidance guaranteeing that innovator data would not be used when approving subsequent applications, such a guidance would not create the reasonable investment-backed expectations that the Supreme Court requires – such promises must be statutory in nature set forth in connection with the statute that authorizes the use of the information by the agency for more limited purposes. In *Monsanto*, for example, even though the Trade Secrets Act prohibited government officials from disclosing information, the Court found that the FIFRA contained no express promise and thus did not create the type of reliance interest necessary to find a taking. *Monsanto*, 467 U.S. at 1008 ("[A]bsent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA.") Thus, the Court stated that "[i]n an industry that has long been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on the disclosure of . . . environmental data concerning pesticides, upon focusing on the issue, would find disclosure to be in the public interest." *Id.* at 1008-1009. If an applicant participates in a heavily regulated industry—and no one could doubt that pharmaceuticals are as much a regulated industry as pesticides—they cannot reasonably expect that an agency will maintain its current regulations in effect forever.

* * *

I appreciate the opportunity to address this important issue on GPhA's behalf.

Respectfully submitted,

John C. Yoo
Professor of Law

[8] It should also be clear that any takings claim based on this theory, even if one existed, could only apply to data submitted before any FDA rule change. Once the reclassification of generic biologics occurs, pharmaceutical companies who continue to submit trade secrets to the FDA will fully know that those trade secrets could be "used" to approve subsequent applications. *See Monsanto*, 467 U.S. at 1006. Companies who submit trade secrets to the FDA while on notice of the FDA's practices will not be able to claim that they maintained reasonable investment-backed expectations that their trade secrets would not be used in the manner described by the FDA. *Id.* at 1005. ("A reasonable investment-backed expectation must be more than a unilateral expectation or an abstract need.")(citation omitted). Any question of a taking can only involve data submitted before any FDA rule change.

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